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July 29, 1997

Rules Processing Team
Minerals Management Service
Mail Stop 4020
381 Elden Street
Herndon, VA 2070-4817

Re: Notice of Proposed Rulemaking:
G&G Explorations of the Outer Continental Shelf
62 Fed. Reg. 6149

To Whom It May Concern:

The attached comments of the International Association of Geophysical Contractors ("IAGC") are filed in response to the Minerals Management Service's ("MMS") Notice of Proposed Rulemaking: Geological and Geophysical Explorations of the Outer Continental Shelf 62 Fed. Reg. 6149 (February 11, 1997). As explained more fully in the comments, the proposed regulations could, if adopted, severely disrupt exploration on the outer continental shelf and could have very significant adverse economic impacts on companies engaged in such exploration. We trust that you will take these comments into account before publishing a final rule.

By filing these comments, however, IAGC does not concede that the changes proposed are within the authority granted by the Outer Continental Shelf Lands Act 43 U.S.C. § 1331 *et seq.* or are properly promulgated pursuant to the Administrative Procedure Act 5 U.S.C. § 551 *et seq.* For these and other reasons, these comments will also serve to put MMS on notice that IAGC hereby reserves the right to exercise any and all legal rights available to it in the event that any of the proposed regulations are promulgated substantially as proposed.

Nevertheless, IAGC continues to seek a dialogue with MMS regarding the critical issues raised in this proceeding. We urge you to reconsider our previous requests to engage in negotiated rulemaking regarding the issues of MMS' access to proprietary data and technology and the release of sensitive information to competitors and the public.

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Should you have any questions, or wish to discuss any aspect of the attached comments, please do not hesitate to contact me.

Sincerely,

Mark N. Savit
Counsel for the International Association of
Geophysical Contractors

MNS:dfl
Enclosure

Notice of Proposed Rulemaking
30 C.F.R. PART 251

Geological and Geophysical Explorations
of the Outer Continental Shelf
62 Fed. Reg. 6149 (February 11, 1997)

Comments of the
International Association of Geophysical Contractors

I. INTRODUCTION

On February 11, 1997, the Minerals Management Service ("MMS") published a Notice of Proposed Rulemaking proposing amendments to 30 C.F.R. Part 251, titled "Geological and Geophysical (G&G) Explorations of the Outer Continental Shelf. 62 Fed. Reg. 6149 (February 11, 1997) (the "NOPR"). The International Association of Geophysical Contractors ("IAGC") is pleased to submit these comments in response to the NOPR. The proposed regulations in the NOPR would cause fundamental changes in the way oil exploration is conducted and the amount of data collected, if adopted. These changes could have devastating effects on the business conducted by IAGC members, their clients (oil exploration companies), and the Outer Continental Shelf ("OCS") leasing program.

The IAGC's 243 members include geophysical contractors, geophysical exploration departments of integrated oil companies, manufacturers of geophysical equipment, as well as suppliers of equipment and services to the geophysical exploration industry. They range from large companies, capable of acquiring massive amounts of seismic geophysical data in the world's most hostile environments, to smaller companies that engage in extremely specialized aspects of the processing, collection, interpretation, and brokering of seismic data. In all, IAGC's membership comprises virtually 100 percent of the worldwide capacity for acquisition and processing of seismic, geophysical data along with a similar percentage of worldwide capacity of specialty geophysical equipment manufacturing.

II. BACKGROUND

Since the amendment of the Outer Continental Shelf Lands Act Amendments in 1978, 43 U.S.C. § 1331 *et seq.* ("OCSLA"), government and industry have cooperated in perhaps the most successful offshore mineral development program in the world. During that time, approximately six billion barrels of oil and 84.6 trillion cubic feet of natural gas have been produced, yielding over $82.7 billion in bonus and royalty revenues to the treasuries of the United States and a number of coastal states. Indeed, the OCS leasing program stands out as a fine example of government and industry cooperation in achieving a mutually beneficial result. The regulatory proposal to which these comments respond, however, threatens to disrupt the balance between public resources and private industry that has worked so well over the last 19 years. In order to understand the centrality of the issues raised by the proposed changes, some background is necessary.

The decision to lease a given tract of land is made, at least in part, on the basis of geophysical data collected prior to that decision. Those data are generally collected by specialized geophysical exploration contractors, at their own expense, under permits issued on behalf of the United States by the Minerals Management Service ("MMS").[1] In exchange for

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[1] The information conveyed by geophysical data constitutes essentially the entire stock-in-trade of geophysical contractors. Geophysical contractors do not drill wells or produce oil or gas. Instead, they perform seismic, gravity, magnetic and related exploration services. These services are performed through three primary business arrangements.

(1) The seismic exploration contractor collects data for the exclusive use of a single oil company ("exclusive survey"). In this case, the data are owned by the oil company which may also be the permittee.

(2) The contractor collects data for his own account and then offers to share the data (pursuant to a confidentiality agreement) with anyone who would like to purchase a license to use it (a "spec" or "non-exclusive" survey). In this case, the contractor is the permittee and may assume all or part of the financial burden of acquiring and processing the data. The use of non-exclusive licenses has been by far the most prevalent business arrangement used in the Gulf of Mexico in the last ten years.

(3) The contractor collects data for a group of oil companies who have agreed in advance to jointly fund the acquisition and processing of the data ("group shoot"). In this case the data Cont.

permission to conduct exploratory activities, the permittees must, among other things, agree to abide by various conditions intended to protect the environment and, most importantly, to make the data collected available to MMS under a variety of circumstances, subject to stringent confidentiality protections. With some exceptions, the data are required to be made available from the permittee to MMS without reimbursement (other than the cost of reproduction). The permits issued by MMS have also traditionally reflected regulatory requirements that the permittee report to MMS any "processing, reprocessing and interpretation" of the data and also, any "transfer" of the data to a "third party." In the case of any "transfer", the "third party" has historically been required to agree to all of the permit conditions imposed upon the permittee.

While much of this seems relatively straightforward, problems arise in the application of permit conditions to parties other than the permittee. By far the most prevalent means of data collection and dissemination in the Gulf of Mexico over the last ten years has been through the use of "non-exclusive" or "spec" surveys. (See footnote 1, *supra.*) Under such arrangements, geophysical contractor permittees do not sell the data they collect, but rather, issue non-exclusive licenses granting limited use rights in that data to the licensee. Typically, these non-exclusive licenses allow the licensees to process and otherwise utilize the data, but they generally also contain prohibitions on the transfer, sale or disclosure of the data, in any format, to any other party.

The use of non-exclusive licensing has been a major impetus in the exponential growth of pre-lease data collection. Using such arrangements, several competing geophysical contractors may conduct surveys of overlapping areas using a variety of techniques. Through the non-

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are owned by the group. However, the contractor may also own one or more shares in the data. These data may be made available to other companies for a fee. In these cases, the permittee may either be the contractor or the operator of the group.

No matter which business arrangement is used, however, the only result of geophysical surveying is the information conveyed by the data. Neither the contractor nor his client knows in advance what the data resulting from any given survey will show. Thus, the value of the data to its owner, whether contractor or oil company lies not in the prospectivity of the data but rather in its exclusivity. The only action that diminishes the value of data is its disclosure to a party that does not already have a right to use it. Such disclosure either reduces the number of possible clients who might wish to pay for a right of access to the data or, as data becomes more widely shared, reduces the commercial advantage inherent in those who already have access to it.

exclusive licensing system, multiple competing oil and gas exploration companies can access the data collected in each survey, thereby increasing geometrically both the quantity and variety of data that can be analyzed prior to making a leasing determination. It is this system that has created the revenue engine that the OCS leasing program has become.

During a May 15 meeting, representatives of the MMS, the geophysical contractors, and major and independent oil and gas companies engaged in a wide ranging discussion regarding MMS' proposed changes to Part 251. At the meeting, MMS representatives indicated that aside from an effort to update and modernize the regulations and a general desire to write regulations in "plain English," the proposed rulemaking was motivated, in large part, by a desire to address perceived difficulties arising from the operation of the "trial procedures" adopted with respect to Gulf of Mexico operations a little over two years ago.[2] Based on further discussions, it appears that the vast majority of the issues raised by MMS are limited to conditions unique to the exploration of sub-salt and salt-adjacent structures in the Gulf of Mexico Region. Because of the unique nature of these structural conditions, it is not necessary to change regulations of universal application, but rather, as was done with the "trial procedures," only to adopt a set of measures intended to address MMS' data needs. MMS could follow this course without upsetting the balance of the program or imposing unnecessary regulatory burdens.

The proposed changes to Part 251 go well beyond what is needed to address possible problems with the "trial procedures." During a public meeting held July 10, 1997, in New Orleans, LA, MMS outlined its perceived needs for data, which, it argued, were not available to it under the current language of the regulations. MMS said that it needed additional data in four specific areas: 1) applications for unitization, 2) applications for royalty relief, 3) reservoir evaluations, and 4) field studies. MMS claimed that the proposed regulations were necessary in order to give them access to data.

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[2] The "trial procedures" were adopted as a result of a cooperative effort between MMS and industry in order to provide MMS with data regarding sub-salt and salt adjacent structures in the Gulf of Mexico which was not otherwise required to be made available to it. A copy of the "trial procedures" is attached.

During that meeting, however, IAGC representatives and others pointed out that there were specific solutions to issues raised with regard to each alleged area of need. In the case of applications for unitization, there is an existing regulatory requirement that data supporting the application be submitted to MMS (30 C.F.R. § 250.194). The same is the case for any application for royalty relief (43 U.S.C. §§ 1337 (a)(3)(C)(ii), (iv)).[3] As for reservoir evaluations, the group pointed out that, as lessor, MMS has authority under the lease to determine that its leased assets are being developed diligently and not wasted. Industry representatives pointed out that any change addressing reservoir evaluation issues should be made to the post lease regulations (30 C.F.R. Part 250) rather than the exploratory regulations. There is no justification to demand data from unsuccessful bidders or those who chose not to bid, in order to resolve a proprietary issue between lessor and lessee. As to field studies, it was made clear that MMS had been doing such studies for the last 19 years without access to the data in question and had not demonstrated any impairment to its mission as a result.

Each of the data needs expressed by MMS can be addressed in a manner sufficient to resolve its concerns without implementing the far reaching and disruptive changes contemplated by the proposed regulations. While the proposed regulations give MMS far greater access to data, they threaten to disrupt the OCS leasing program to such an extent that the quantum of data collected will undoubtedly shrink to a fraction of what is currently collected and processed. In short, the proposed regulations ultimately give MMS greater access to data, but at the expense of a dramatically shrunken data set.

The proposed regulations present three distinct threats to current data collection and processing efforts. Through the imposition of consultation, coordination and written advance notice requirements, the proposed regulations threaten to make the geophysical survey industry the *de*

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[3] Under the terms of the Royalty Relief Act, however, relief is to be granted with respect to certain tracts absent any application on the part of the lessee. MMS has some role in determining both the eligibility for and the amount of royalty relief on a given tract. It is possible that some data may be helpful in making those determinations. However, no determination is to be made until commercial production is declared on a given tract. Thus, to the extent that MMS needs data to perform this function, it can obtain it from the lessee, using its authority under the lease.

jure "junior user" of the OCS. Second, through a myriad of required notices, as well as changes to the definition of "third party" and "transfer," they threaten the confidentiality of the data collected by the contractor, as well as the proprietary technologies used to process it. Finally, they threaten to subject non-exclusive licensees to the conditions identical to those imposed on the contractor. This not only jeopardizes the competitive position of the licensees in the leasing process, it exposes proprietary technology -- technology that forms the key to multi-million dollar leasing decisions -- to the public at large. If adopted, the proposed changes would alter the balance between industry and government in the OCS leasing process and ultimately threaten its viability.

III. THE PROPOSED CHANGES

In addition to the proposed changes to the definitions of "third party" and "transfer," MMS proposed changes to a number of other existing regulations. The majority of these proposed changes have no effect on MMS' access to data held by non-exclusive licensees.

A. The Non-Disclosure Related Provisions:

Section 251.2 (Purpose)

The language of the existing rule (Section 251.1) addresses only what activities are authorized by the regulations. In contrast to the proposed rule, it does not list the nature of the restrictions that are to be placed on that activity. The proposed change is, therefore, important because it signals a change in the fundamental purpose of the regulatory framework. As the mineral right owner, MMS must set out a procedure for authorizing the geological and geophysical exploration of its property. To the extent that such operations are restricted, for whatever reasons, those restrictions are secondary to the overriding purpose of Part 251.

The proposed rule appears to reverse the clear direction of the statute and to prohibit exploration where there is any "harm" to both living or economic resources. Most importantly it

appears to prohibit any activity that could harm the "quality of life" of those "indirectly affected" by exploration activity.[4]

MMS is well aware of the myriad challenges both to leasing and pre-lease activities, that have taken place in the past. The proposed language would seemingly expand the grounds for challenges to OCS exploration from a group of people affected only in the most tangential way. For instance, under the proposed language, a challenge might be brought by someone who was unaffected by geophysical surveys themselves, but who could contend that increased production and use of fossil fuels would affect his "quality of life." Clearly such a result could not have been intended.

If, in fact, the sole purpose for the proposed revision of this section is to put it into "plain English," there is no reason to risk the possibility that the revised language could conceivably expand the grounds upon which OCS actions could be challenged. Following the statutory language, with a more specific iteration of the varieties of interests sought to be protected would be more consonant with both the mandates and strictures of the OCSLA.

Section 251.2 (Definitions)

"Notice"

The definition of the term "notice" is proposed to be changed in such a way that it appears that all communications with MMS regarding ongoing operations must be in writing. However, the definition, and its apparent ban on oral communications, appears not to be applicable to operations conducted under permit. Unfortunately, the use of the words "notice" and "notification" to denote the sort of communications that must be made to MMS before research is commenced and also to denote the communications to be made to MMS regarding the

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[4] Proposed Section 251.2 mentions only the "human environment," but the proposed definition of "human environment" includes the term "quality of life." *See* Proposed Section 251.1 The term "quality of life" is not defined, and may be entirely subjective.

modification of operations conducted under a permit, is extremely confusing. During the July 10, 1997 public meeting, MMS representatives stated that the proposed revisions were not intended to prohibit oral communications regarding changes in operations conducted under a permit so long as they are followed up in writing. Thus, the language of the proposed regulation must be changed in order to ensure that the apparent unintended result created by the proposed rule is avoided.

"Third Party"

The new definition of "third party" expands the term's coverage to include, among other things, holders of non-exclusive license rights in data collected by a permittee. In conjunction with Sections 251.11 and 251.12, it will subject those licensees to myriad regulatory requirements to which they have not previously been subject.[5] The implications of this proposed change are discussed in more detail in Section III B of these comments.

"You"

Read in conjunction with Sections 251.11 and 251.12, the use of the word "you" to denote the person to be notified in the event of disclosure is extremely unclear. It could mean the data owner, or it could mean any of the entities that licensed the data from the permittee, or based on the proposed definition of the term "you", it could mean anyone who ever inquired about a permit. Such a system would result in massive confusion as to the entity to be notified and the obligations of the notified entity vis-a-vis all other entities who have assumed the obligations of the permittee. The goals of re-writing the regulations in plain English are admirable, but need not be achieved at the costs of clarity and precision. The issue of which entity will be notified of <u>any</u> disposition of the data is a matter of extreme importance and must be treated with the utmost care. The proposed regulation must, therefore, be rewritten to ensure that the data owner,

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[5] The particular issues arising as a result of the imposition of those additional requirements are discussed separately in conjunction with Section 251.11 and 251.12 *infra*.

as well as the submitter, if different from the data owner, is notified and consents before any data can be released, no matter to whom.

Section 251.6(a)(2)

Unlike the existing regulation, the proposed rule refers to the newly defined "human environment." Given the new definition, the reference, once again, to the "human environment" appears to grant to MMS the power to deny permits based on subjective judgments regarding the "quality of life" of people who are otherwise unaffected by the activity itself. If, as was the case with proposed section 251.2, the primary purpose of the proposed rule is to put existing language into "plain English," then MMS must take care to ensure that the proposal does not create deleterious consequences unintended by the drafters.

Section 251.6(a)(7)

The language of the existing regulation prohibited only "unreasonable" interference with other uses of the area. This placed G&G activities on at least an equal footing with other ocean users. The proposed elimination of the term "unreasonably" appears to prohibit seismic exploration activity whenever any other ocean user claimed that geophysical survey activity would "interfere" with its activities.

In total contravention of the mandates of OCSLA, the proposed change will make the geophysical exploration industry the junior user of the OCS. Under the proposed rule, for instance, a fisherman could decide to fish in an area of seismic acquisition, giving the seismic contractor the alternative of shutting down operations so as not to interfere with another use of the area, or pay the fisherman to depart from the area. Of course, payment to the fisherman would virtually guarantee that the fisherman would continue to come back to the same area during the duration of the survey, presumably preferring the certainty of payment by the contractor over the uncertainty of fishing. When read in the context of Section 251.6(c), the enormity of such a

restriction, making a permittee dependent on the whim of every other (unregulated) ocean user, becomes graphically apparent.

At the July 10, 1996 public meeting, MMS representatives said that it was not their intent to create such a result. They stated that they would consider favorably the restoration of the term "unreasonably" to the proposed rule, or simply return to the existing language. We look forward to such action in order to avoid the unprecedented disruption to G&G activity created by adoption of the proposed rule.

Section 251.6(c)

This proposed rule contains entirely new language which would require all parties conducting activities under permit to "consult" with all other ocean users and "coordinate" survey activities with them. Unfortunately, none of the parties with whom such consultation and coordination is required is subject to a similar regulatory requirement. This new requirement would not only be impossible to comply with, but would also create unquantifiable disruption to G&G operations.

In most cases (i.e. fishing and marine transportation) there is no entity or contact with which to coordinate. Even if such consultation and coordination could be carried out, this new language could be read to require geophysical exploration to cease unless all other ocean users allow it to go forward. That is clearly not the mandate of the OCSLA.

To the extent that the proposed regulations were intended to require consultation among competing permittees, MMS must be careful to avoid putting such competing parties into a position where they are required to reveal proprietary information regarding the timing and location of planned surveys. Such a requirement could place companies in violation of anti-trust laws and, even if it did not, would create a significant disincentive to anyone seeking to start a new program in or near an area where activity is already ongoing.

Once again, at the July 10 public meeting MMS indicated that it had not intended that G&G operations be placed at the mercy of every other ocean user. MMS representatives indicated that this language was intended to reflect a much more circumscribed coordination requirement contained on existing permits. They agreed to check the permit form to ensure that the language of the final rule did not go beyond it.

Section 251.6(d)

This provision is proposed to be expanded to require the use of "best available and safest technology" ("BAST") to seismic exploration activities. There is no such requirement in the existing regulations.

While apparently intended to apply only to stratigraphic test wells, the amendment could, if adopted, be interpreted so as to allow MMS to dictate to permittees the type of data acquisition and processing technology to be used. Obviously, if the MMS technologies differed from the technologies chosen by the contractor or the oil industry, no commercial exploration would go forward. MMS has indicated that it did not intend such a result and that the proposed requirement was intended to be applicable only to the drilling of stratigraphic test wells. That correction would cure the defect.

At both the May 15 and July 10 meetings, MMS representatives stated that they had not intended to incorporate the proposed expansion of the BAST requirement to seismic exploration into the final rule. They reiterated, however that the BAST requirement would continue to apply to stratigraphic test wells.

Section 251.4(b)(2)

Among the stated purposes of the proposed rules was the expansion of the notice requirement for scientific research. As the preamble to the proposed rule points out, the proposal made in this section was:

> . . . developed to address instances in which academic institutions conducted research and:
>
> - They or industry sponsors held the data and analyzed and processed information and proprietary.
>
> - They also offered for sale at least some of the data and information.

62 Fed. Reg. 6150.

IAGC commends MMS for its effort in attempting to ensure that all entities conducting G&G activities for commercial or other reasons are treated equitably. However, the regulations go beyond their intended result and will create serious problems for the development of new technology necessary for the continued viability of G&G exploration of complex formations in the Gulf of Mexico.

Read literally, the proposed regulations would empower MMS to regulate research on acquisition technology even where no data were collected. First, since no exploration of the OCS would have been undertaken, the activity is arguably beyond the authority of MMS to regulate. Nothing in the OCSLA authorizes regulation of research regarding such technology. Even assuming that such regulation is authorized, the proposed regulation would require that a test of new airgun or streamer cable technology would be subject to advance, written notice. Such notices are not protected under Section 1350 of the OCSLA and thus, would enable anyone to observe and, if desired, to record such highly confidential and proprietary tests as they are conducted. In a technology-based business, disclosure of such confidential and proprietary information could be devastating.

The problem with the proposed regulation appears to stem from the use of the phrase "related to oil, gas and sulfur" to describe the scope of the research being regulated. That phrase encompasses the testing of technology even where no data are collected for exploration purposes --

activities beyond the scope of the statute. Once again, it appeared from the discussion at the July 10 meeting that MMS did not intend to encompass these sorts of activities. During these discussions, it appeared, however, that MMS believed that the best way to avoid the problem was for the proposed research to be conducted under a permit. The placement of such activities under permit, while addressing some of the more obvious problems inherent in the proposed rule, creates several additional problems.

In the first place, there is a requirement in the permit that data collected thereunder be shared with MMS. Such a requirement would compromise the confidentiality of data related solely to the development of new technology, while providing no useful information to the government. Since such data do not relate to the OCS, but rather to the acquisition technology tested, it is questionable whether such information falls within the protections afforded by the OCSLA. Finally, it is often the case that the technology being tested has not been developed by a geophysical contractor or an oil and gas company, but by a third party equipment manufacturer. Where such technology was tested and the results of the tests are in possession of the manufacturer, the proposed rules would require that the manufacturer assume all of the obligations of the permittee even though the manufacturer conducts absolutely no OCS exploration. Thus, the proposal would subject companies to numerous requirements well beyond the reach of the statute or the current regulations. Moreover, even if such a requirement were within the authority granted by OCSLA, it would deprive the permittee of the results of its private research without compensation, and is therefore, unconstitutional.

IAGC therefore proposes that the following language be adopted in lieu of that which was proposed:

> Section 251.4(b)(2)
>
> Any other G&G scientific research that you conduct ~~related to oil, gas, and sulfur~~ *in which data are collected for the purpose of gaining knowledge regarding the subsurface of the* OCS requires you to file a notice with the Regional Director at least 30 days before you begin. If circumstances preclude a 30-day notice, you must provide oral notice and follow-up in

writing. You must also notify MMS in writing when you conclude your work.

Section 251.5

As discussed above, were Section 251.4 to remain as proposed, it would apply to proprietary research on commercial acquisitions or processing technology. However, were Section 251.4 reworded as suggested above, MMS' concern regarding the misuse of data collected under the rubric of "research" would be adequately addressed without risking the disclosure of valuable proprietary technology as proposed in this rule.

Section 251.8

The language of the proposed regulation would, if adopted, remove the term "actual" from the term "actual costs" in describing the amounts for which permittees can be reimbursed if MMS inspectors are required to be accommodated during activities authorized under this part. This change appears to empower MMS to disallow actual costs incurred in feeding, housing and transporting its inspectors. If that was MMS' intent, on what basis does MMS propose to offer reimbursement?

Additionally, the new language added to Section 251.8(b) appears to eliminate the ability of a permittee to make modifications of its program orally, regardless of how minor the modification might be. Such a restriction will make it harder to adjust seismic activities in response to the activities of other ocean users. This appears to be inconsistent with the intent of the proposed regulations. Greater flexibility in the ability to modify programs based on other activities in the area could, in fact, eliminate the need for pre-survey consultation and coordination.

At the July 10 meeting, MMS representatives recognized the need for flexibility in notifying MMS of modifications to ongoing operations conducted pursuant to a permit. They pointed out, however, that such oral notifications had historically been required to be followed up

in writing. IAGC has no objection to a continuing requirement that oral notifications be followed up in writing so long as flexibility remains to make the initial notification orally. Flexibility and communications are the two keys to avoiding conflicts in this competitive arena. Imposition of rigid requirements for written communication are contrary to the goals for other sections of the proposed rules.

B. The Data Disclosure Provisions

Section 251.11(b)(1)

Although the proposed amendment to this standard is facially applicable only to geological data and information, it remains a cause of great concern. It would, for the first time, empower MMS to inquire into sensitive, proprietary technology used to process and interpret integrated seismic and geological data.

This is because increasingly, the distinction between geological and geophysical data is blurred. The products of modern exploration efforts are blends of various types of data, integrated so as to best highlight the subsurface characteristics of greatest interest in a given play or prospect. In many cases, the end product of this "geoscience" contains elements collected under permit, as well as other information to which MMS has no right under statute (i.e. ties to wells in state water or onshore, data collected under the auspices of foreign governments). Such data is inarguably outside the purview of MMS. Accordingly, MMS's demand for uncompensated access raises serious constitutional issues.

The amendments to this section shift its focus from geological "information," (a defined term meaning processed, analyzed and interpreted data) to descriptions of the technologies and techniques used to arrive at processed, analyzed or interpreted information. First, the use of the term "information" in a generic sense in the amended standard is misleading. It does not refer to geological or geophysical "information" as that term is defined at Section 251.2, but really refers to descriptions of proprietary technology. OCSLA does not grant to MMS the authority to

demand such descriptions, nor does it appear that the stringent statutory protections of Section 1350 of the OCSLA extend to them.

At the July 10 meeting, MMS representatives explained that the amendments to this section were not intended to allow MMS to pry into these highly sensitive areas but rather, language is intended merely to codify an existing requirement contained on the permit. As MMS explained it, this permit condition requires the transmission of basic sampling data sufficient to allow MMS use of the data it receives in a proper scientific context. IAGC has no objection to the codification of the shortened current permit requirement.

The threat posed by the language of the proposed regulation cannot be overemphasized. MMS must be mindful of the fact that, as worded, the proposed regulation goes far beyond the intent expressed at the July 10 meeting. Any compromise of the confidentiality of this most sensitive technical data will severely affect every segment of the exploration industry. Adoption of the regulation along the lines proposed will, as a result, hamper, rather than foster, MMS' desire to have a richer database from which to draw.

Section 251.12(a)

The proposed elimination of the 30-day period in which to file notices under this section is simply unrealistic. It is complicated by the fact that no definition of "immediately" is offered. IAGC is at a loss to understand the need for such urgency, and, to date, none has been offered by MMS. Unless MMS can demonstrate cause for earlier notification, we see no need to replace the existing standard.

At the July 10 meeting, MMS appeared to agree that "immediate" notification was not required and that this proposal would not likely be enacted. IAGC applauds the decision. Further, as pointed out in the discussion at the meeting, IAGC urges MMS to address the issue of what the term "initially acquire" means in the context of the proposed regulation. Clarification of this

phrase will eliminate confusion as to when the reporting "clock" starts and will thus simplify communications between the industry and the agency.

Sections 251.1 ("third party"), 251.11(c) and 251.12 (d)

These sections spell out for the first time, MMS' belief that the issuance of non-exclusive, limited use licenses in data held by a permittee constitutes a "transfer" of that data within the meaning of the OCSLA. Although MMS contends in the preamble to the proposed regulations that the proposed changes to these regulations are no more than "clarification," that is simply not the case.

First, this is not the first time that MMS has attempted to broaden the requirements for data disclosure. Existing sections 251.11(c) and 251.12(c) require that permittees notify the Director of the MMS whenever any data collected pursuant to an MMS permit is "transferred" from the permittee to a third party or from that party to another third party. That section further requires that the permittee must require the receiving third party to abide by the regulations governing the permittee as a "condition precedent to the transfer." Proposed section 251.2 offers, for the first time, a definition of "third party." The proposed definition spells out MMS's contention that a non-exclusive licensee is considered to be a "third party." Additionally, language added to the proposed Sections 251.11(c) and 251.12(d) spells out MMS's position that the issuance of a non-exclusive license is a "transfer" within the meaning of the regulation.

Although it may have occurred in the past, MMS does not commonly seek data from non-exclusive licensees of permittees, nor has it contended that the issuance of a non-exclusive license constituted a transfer within the meaning of section 251.12(c). However, approximately four years ago, one MMS regional office asserted that as the case. This view came to light when MMS demanded copies of "reprocessed" data from a non-exclusive licensee of a permittee, arguing that its authority for such a request stemmed, *inter alia*, from section 251.12(c). It was this request, that ultimately led to the adoption of the "trial procedures."

MMS' expansive view of section 251.12(c) is unwarranted. The word "transfer" is undefined in the regulations concerning collection, submission and release of seismic data. Its common meaning is "to convey from one place, person, or thing, to another; transport, remove, or cause to pass, to another place, person, or thing;" or "the conveyance of right, title, or property, either real or personal, from one person to another, whether by sale, by gift, or otherwise; any act by which the property of one person is vested in another."[6] Since the title or possession of the data remains with the licensor, and only limited use rights are conveyed under a non-exclusive license, no "property" is "vested" in another. Thus, the issuance of a non-exclusive license would not appear to constitute a "transfer."

A good illustration of the type of right conveyed by a non-exclusive license is a video tape rental. Although a physical copy of the tape changes hands, the renter does not own it, nor may he copy it, sell it or charge others to see it. Of course, he may watch it, change speeds, stop action, and fast forward through the boring parts or repeat the most interesting sections. He may draw whatever conclusion he wants from it or even "analyze" it and use lessons learned from it to guide his actions. But, he may not dispose of it in any way except to return it to the rental shop.

In addition, the regulations themselves indicate that the term "transfer" was meant to be construed narrowly. Other regulations within part 251 make reference to much broader terms regarding the conveyance of data or rights thereto. For instance, the term "delivery" is used to describe how data is conveyed to MMS upon proper demand.[7] The term "disclosure" is used to describe release of information to the public as well as the limited rights conveyed to third parties who might be employed by MMS to assist them in interpreting data.[8] Ironically, the transfer of limited rights to use the data for evaluation of resources by affected states is called "sharing."[9] Given the vocabulary used by the drafters throughout the rules, it seems that a broader term than

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6 *Webster's New International Dictionary of the English Language, Unabridged* 2689 (2d ed. 1941). (emphasis added).

7 *See* 30 C.F.R. § 251.13 (b) (1990).

8 *See* 30 C.F.R. §§ 251.14-1, 251.14-2 (1990).

9 *See* 30 C.F.R. § 251.14-3 (1990).

"transfer" would have been used had they meant to convey the broad rights which MMS now asserts.

Last and most telling, MMS has apparently forgotten that, in the context of this proposal, MMS's own prior action regarding the scope of its rights, vis a vis non-exclusive licensees in the scope of section 251.12(c), was significantly narrowed during the period of time between its original proposal and its promulgation in current form. As first proposed, the text of the predecessor to section 251.12(c) stated:

> In the event a permittee transfers geophysical data or processed geophysical information to a third party, or a *third party who has received geophysical data or processed geophysical information directly or indirectly from a permittee,* transfers the geophysical data or processed geophysical information to another third party, the transferor shall notify the Director of *such transmittal*, and the transferor shall bind the third party, in writing, to the obligations of the permittee as specified in this section.[10]

The italicized language was clearly intended to encompass the type of transaction sought to be brought within the auspices of the proposed rule. However, the italicized language was eliminated when the final rule was published.[11] The current, narrower language of the regulations was ultimately adopted.[12] Clearly, section 251.12(c) was intended to allow MMS to make sure that it retained access to data collected under one of its permits, but to which the permittee no longer had title. Had the rule been intended to give MMS access to data held by non-exclusive licensees, it would have retained its original, proposed form.

As far as IAGC is aware and contrary to MMS' assertion, MMS has not "routinely obtained G&G data and information" from the class of persons to whom such disclosure obligations would be extended under the proposed rule.[13] Second, the "regulated community"

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10 44 Fed. Reg. 8308 (1979) (to be codified at 30 C.F.R. § 251.12(b)(3)) (emphasis added).

11 *See* 45 Fed. Reg. 6338, 6350 (1980).

12 *Id.* at 6343.

13 To the extent that MMS believes it can support such a statement because data has been Cont.

has never "been aware" that non-exclusive licensees of data were subject to the requirements sought to be imposed in this rulemaking. In fact, to the extent that MMS has asserted such a right, industry has vigorously opposed it. Finally, as shown above, MMS's own actions show that it has not always held so broad a view of its authority. In short, MMS's characterization of its past position on this vital issue has been less than candid.

MMS's prior action is especially important to the current rulemaking. MMS has taken the position, both in the NOPR and repeatedly during the July 10 meeting, that it has always had authority to demand data for non-exclusive licensees and that the regulated community was always on notice of that fact. Yet, the history of the existing regulations reflects precisely the opposite position. MMS's past rulemaking clearly rejected MMS's present position and adopted a narrower construction. The regulated community has relied on that narrower interpretation since the regulation was adopted.

Putting aside the very real questions of statutory authority, there remains serious concerns regarding the burden the proposed regulations would impose on all sectors of the offshore industry. The additional reporting burdens imposed by the proposed regulations have been addressed in the comments already submitted. Each company that receives data under license will now be required to establish an apparatus for reporting the acquisition, processing and reprocessing of the data, for accounting for data transmitted and for the minimal reimbursement received. Of course, none of the administrative cost of setting up that apparatus is to be reimbursed. To the extent that these requirements impose costs and obligations on parties who receive no government benefit in return, they run afoul of the fundamental Constitutional prohibition against the taking of property without compensation.

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made available to it pursuant to the Trial Procedures, it is wrong. The Trial Procedures were intended as nothing more than a voluntary attempt to address issues of disagreement regarding the handling of certain Gulf of Mexico data and information. They emphatically did not constitute a concession by industry that MMS had a statutory right to obtain the data covered by the procedures

It bears repeating that a great deal of the additional information requested by the proposed regulations may not be protected by the provisions of Section 1350 of the OCSLA. Information such as the identity of licensees, as well as a description of the data that has been licensed will be at risk of disclosure if MMS makes the information available in the absence of statutory protection. Since release of this information would reduce the value of the data both to the permittee and the licensee, it is quite likely that the requirement to make it available to MMS under such conditions could violate the constitutional prohibition against the taking of private property without just compensation.

The ability to issue non-exclusive licenses lies at the heart of current Gulf of Mexico exploration practices. A requirement that licensees be subject to data disclosure requirements will have significant adverse impacts on the willingness of permittee contractors to collect data "on spec" and issue such licenses in the future. What is more, the requirement that a licensee assume all obligations of a permittee on each license it accepts will subject the licensee to significant additional expense in addition to reporting and making data available to the MMS.

In proposing this amendment, MMS neglected to consider that obligations placed on a permittee go far beyond those related to data sharing. Many of the conditions commonly placed on permittees have to do with environmental protection or other matters related solely to data collection operations. Some of those conditions require the permittee to engage in certain required activities that must be completed prior to engaging in data collection. Absent a thorough audit of the permittee's compliance, the licensee will have no way to determine whether the permittee, whose obligations he must accept, has complied with those conditions. Additionally, many permit conditions subject the permittee to potential liability following completion of its collection activities. The assumption of these conditions will subject any licensee to potential liabilities which could exceed the value of the limited rights he has acquired[14]. It is quite likely

[14] This situation is further complicated by the fact that there are generally multiple licensees to data acquired under a single permit. There is, however, no explanation of how such liability would be apportioned among multiple licensees. Any such discussion must take into account the fact that: 1) the nature of the data set licensed may differ among licensees, and 2) licensees are not generally issued simultaneously for data collected under a single permit.

that the requirement that these potential liabilities be assumed will increase the cost of receiving a license beyond what is reasonably capable of smaller, independent operators.

All past licenses have been issued in reliance on MMS's rejection of broad data access rights in the 1979 rulemaking. Thus, the new requirement that each license must contain such an explicit acknowledgment on the part of the licensee could require the renegotiation of hundreds of existing license agreements. Given its past rulemaking, MMS cannot now reasonably contend that data licensed under the prior rule would retroactively be made subject to disclosure, even if the proposed rule were adopted. It would also delay any new licensing transactions until the parties agreed upon the language. Each new license may take months to negotiate. And, MMS must bear in mind that it has proposed that no data be licensed until such negotiations are completed. The economic consequences of both the renegotiation effort and the delay that it would create would be devastating.

These added burdens will reduce the value of a license to a point where it may no longer be economic for the permittee contractor. The specter of compromised confidentiality, degraded economics, and increased regulatory burdens would be chilling to anyone interested in collecting or licensing data. The impact of such action on exploration in the Gulf of Mexico cannot accurately be predicted, but it would undoubtedly be significant.

The issues raised by this proposed amendment are the most significant issues facing the industry since the passage of the OCSLA amendments 19 years ago. The new regulatory regime would force restructuring the entire offshore exploration industry. Before it proceeds, MMS must consider whether it's needs for additional data are worth the destruction of a system that, to date, has been an unqualified success in the exploration for and development of the petroleum resources of the outer continental shelf.

Section 251.12(c)(3)

The newly-added requirement that a permittee provide data in a "quality" format is not readily understandable. Taken as a whole, it appears to allow MMS to require that data of

unacceptable "quality" be reprocessed to meet some undefined specification. Yet there appears to be no provision for reimbursement of the permittee for this effort. Absent compensation, MMS clearly cannot order the reprocessing of data to suit its particular needs or "quality" requirements and the language of this section should be modified to make that clear.

Section 251.14(c)

The change in the officer responsible for decisions to disclose or to protect data is apparently intended to put the decision maker closer to the circumstances surrounding the data sought to be disclosed. However, in many cases the permittee has no asset other than the data on which to base his business. Moreover, even if the data is not the central asset of the business itself, wrongful disclosure of the data could have disastrous consequences from a competitive standpoint. This fact is explicitly recognized in the Section 1350 of the OCSLA which prescribes unprecedented criminal penalties, applicable to government officials who wrongfully disclose protected data. To ensure that that official is bound by all applicable laws and regulations regarding the dissemination of data, the regulations should place the ultimate decision to disclose or to withhold data in the hands of the top official of MMS.

Regulatory Flexibility Act

With respect to aspects of the rule affecting data access and licensing, MMS has neglected to perform the required analysis under the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612. In the July 10 meeting, an MMS representative indicated that the provisions regarding the "transfer" of data by licensing arrangements was not part of the proposal when the Department conducted its regulatory flexibility analysis, and that, in any event the impacts on small business appeared to have been significantly underestimated. A defect of this nature constitutes a direct violation of the Regulatory Flexibility Act:

> The [Regulatory Flexibility Act] provides that all agencies, as part of the rulemaking process, must conduct a "regulatory flexibility analysis" for any rule that has a "significant economic impact on a substantial number of small